UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

CENTRAL WEST VIRGINIA COMMUNITY
ACTION ASSOCIATION, INC.[1]

Employer

and **Case** 6-RC-12164

SEIU, DISTRICT 1199, THE HEALTH CARE
SOCIAL SERVICE WORKERS UNION,
AFL-CIO[2]

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer is a nonprofit corporation engaged in the operation of Head Start programs and other community action programs. The Petitioner filed a petition with the National Labor Relations Board pursuant to Section 9(c) of the National Labor Relations Act (the Act) seeking to represent in a single unit certain employees of the Employer. At the hearing, the parties stipulated that the petitioned-for unit, as amended, was appropriate for the purposes of collective bargaining. The unit is more fully described herein.

The primary issue in this case is whether the Employer is exempt from the Board's jurisdiction as a political subdivision within the meaning of the Act. For the reasons set forth below, and contrary to the contention of the Employer, I find that the Employer is not exempt from the Board's jurisdiction.[3]

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[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

[3] The Employer filed a timely brief which has been duly considered by the undersigned.

Section 2(2) of the Act provides, in relevant part, that "[t]he term 'employer' shall not include . . . any State or political subdivision thereof[.]" Under the Board's test as described in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600, 604-605 (1971), entities are exempt from the Board's jurisdiction as political subdivisions if they are "either (1) created directly by the state so as to constitute departments or administrative arms of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate." There is no contention here that the Employer was created directly by the State. Therefore, to constitute a political subdivision, the Employer must be "administered by individuals who are responsible to public officials or to the general electorate." The Board recently reaffirmed the principle that an entity will be found to be an exempt political subdivision if a majority of its board of directors "[is] responsible to public officials or to the general electorate." FiveCAP, Inc., 331 NLRB 1165 (2000); Enrichment Services Program, Inc., 325 NLRB 818, 819 (1998). Thus, to decide whether the Employer is an exempt political subdivision it must be determined whether a majority of its board of directors is responsible to public officials or to the general electorate. Before addressing this issue, I will briefly set out the relevant facts.

I. EMPLOYER'S BOARD OF DIRECTORS

As noted, the Employer is a nonprofit corporation engaged in the operation of Head Start programs and various other community action programs. The Employer serves two counties in West Virginia[4] and has its principal office in Clarksburg, West Virginia. As a nonprofit community action agency that receives federal funds pursuant to the Community Services Block Grant (CSBG) Act,[5] the Employer is required to have a board of directors with a

[4] The counties served are Harrison and Lewis Counties.

[5] The Employer receives funding for its community action programs indirectly from the United States Department of Health and Human Services (HHS). HHS transmits, on an annual basis, community services block grants to the states for these programs. The states, in turn, transmit these funds to entities, like the Employer, which provide these programs. The Employer receives funds for its Head Start programs directly from HHS.

tripartite structure, with one-third of its 18 members elected public officials, one-third chosen from the private sector, and one-third "persons chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area served."[6] The Employer's by-laws also provide for a tripartite board structure, with the three sectors defined as public sector, private sector and "low-income sector." The Employer's by-laws do not, however, provide that the representatives of the low-income sector be selected in accordance with a democratic selection procedure as required under Federal law.

The selection procedure set forth in the by-laws merely requires that to be a candidate to represent the low-income sector,[7] interested persons should attend the annual meeting of the board of directors and state their reasons for interest in being a representative of the low-income sector.[8] Those board members from the public and private sectors then vote by secret ballot to select the low-income representatives from the group of candidates who have submitted their names for consideration.

II. CONTROLLING CASELAW

The Board, on a number of occasions, has considered whether community action agencies which received federal funds pursuant to the CSBG Act and also had tripartite boards of directors were exempt from the Board's jurisdiction as political subdivisions. In those cases, the resolution of the issue of whether the employers were exempt political subdivisions depended, as here, on whether a majority of the board of directors was responsible to public officials or to the general electorate. Since it was undisputed in each of those cases that the

[6] CSBG Act, 42 U.S.C. Sec. 9904(c)(3).

[7] According to the Employer's by-laws, one low-income representative will be from each county and the other four low-income representatives will be selected at large from the entire service area.

[8] The by-laws require that legal notice is to run for three consecutive days in the newspapers of Harrison and Lewis Counties requesting that interested persons attend the board of directors' annual meeting at the date and time specified therein in order to express their desire to become representatives of the low-income sector.

one-third of the board composed of elected public officials was responsible to the general electorate and that the one-third of the board composed of community leaders was not responsible to public officials or to the general electorate, the determinative issue was whether representatives of the poor in the area served were responsible to the general electorate.

In Economic Security Corp., 299 NLRB 562 (1990), and in Woodbury County Community Action Agency, 299 NLRB 554 (1990), one-third of the board was required to be elected by persons in the served area whose incomes were at or below the poverty level. In both cases, the Board found the employers involved to be exempt from the Board's jurisdiction as political subdivisions since, in the Board's view, the CSBG Act envisioned an election by the poor of one-third of the members of the respective board of directors and that, accordingly, the individuals so chosen were "responsible" by law "to the general electorate" within the meaning of Hawkins County. Thus, the proposition as espoused by the Board in both Economic Security Corp. and Woodbury was that, at least with respect to employers receiving federal funds pursuant to the CSBG Act and which had tripartite boards of directors, the Hawkins County phrase "general electorate" was to be broadly defined to encompass limited groups of electors of the type found in those cases.

Subsequently, in Enrichment Services Program, Inc., supra, the Board reconsidered the issue of whether an entity, which receives funds under the CSBG Act, is an exempt political subdivision. Overruling Woodbury and Economic Security Corp. and all subsequent cases in which the Board had found that the CSBG Act anti-poverty service programs were exempt political subdivisions where "representative of the poor" members of the tripartite board were elected by a limited group of voters, the Board found that "individuals are responsible to the general electorate under Hawkins County only if the relevant electorate is the same as that for general political elections." Id. at 820 and fn. 13.

Applying this standard to the facts of Enrichment Services, the Board found that the employer's board of directors who were "elected by the poor" were not "responsible . . . to the

general electorate" within the meaning of the Hawkins County test because the electorate comprised members of only low-income neighborhoods, and such an electorate was not the same as the electorate for general political elections. Id. at 819-820. Accordingly, the Board found that the employer was not an exempt political subdivision because less than a majority of the employer's board was comprised of public officials or individuals responsible to the general electorate.

Recently, in FiveCAP, Inc., supra, the Board again considered the issue of whether the one-third of the board required to be "representative of the poor" was responsible to the general electorate under the Hawkins standard. In that case, the employer's by-laws required that to be a candidate to represent the low-income group to be served, one only had to submit a petition signed by 20 residents of the county of the group to be served. If there were more candidates from the low-income group to be served than board vacancies for that group, the board would vote to fill the vacancies from among the candidates whose petitions had been submitted for consideration. The Board noted that since individuals chosen by such a procedure are not elected by an electorate that "is the same as that for general political elections,"[9] it found that these individuals were not responsible to the general electorate under the Hawkins County standard. Accordingly, the Board held that since less than a majority of the employer's board was composed of public officials or individuals responsible to the general electorate, the employer was not exempt from the ambit of the Board's jurisdiction as a political subdivision.

III. APPLICATION OF LAW TO FACTS

Applying the Enrichment Services/FiveCAP analysis to the facts of this case, I find that the determinative issue here is whether the one-third of the board required to be "representative of the poor" is responsible to the general electorate. In this regard, the facts in the instant case are strikingly similar to those in FiveCAP. Here, the Employer's by-laws only require that to be a

[9] Enrichment Services, supra at 820.

candidate to represent the low-income group to be served, one must advise the Employer's board of his or her intent. The candidate does not even have to submit a petition signed by a threshold number of residents of the county from the group to be served to be considered for selection to the board.

The Employer contends, however, that the six members of the board representing the low-income sector are responsible to the general electorate within the meaning of Hawkins County because, unlike Enrichment Services and FiveCAP, the low-income representatives are selected by the general electorate as a whole rather than by a limited group of the general electorate. More specifically, the Employer contends that the low-income representatives are selected by the general electorate because the Employer opens nominations for the board seats to the public at large. In this regard, the Employer emphasizes that the general electorate is annually given notice by the Employer of openings on the board for persons who wish to serve as representatives of the low-income population and that anyone can nominate any persons within the geographical area served. The remaining twelve members of the board, notes the Employer, accept these nominations through the time of the annual meeting, which is publicized and open to the public.

Thus, the Employer argues that its selection process for low-income representatives ensures that these particular board members are responsible to the general electorate since the public, without limit, is given the opportunity to nominate any candidates they choose for these board seats. By contrast, argues the Employer, the low-income representatives in Enrichment Services were voted on by small community groups which had a very limited membership while the low-income representatives in FiveCAP were only accountable to the mere 20 persons who signed their petitions. Importantly, avers the Employer, the democratic process in Enrichment Services and FiveCAP was also undermined because those agencies gave no public notice of the availability of those seats, did not accept nominations from the general public and did not

open the election meeting to the general public to be part of the election process, as does the Employer.

I have considered the Employer's arguments, as set forth above, and I find, contrary to the Employer's assertions, that under the standards set forth in Enrichment Services and FiveCAP, the individuals chosen to represent the low-income sector are not elected by an electorate that is the same as that for the general political elections and that they are not responsible to the general electorate under Hawkins County. In this regard, I note that contrary to the contentions of the Employer, the record contains insufficient evidence to establish that candidates are nominated by the general public. The Employer's by-laws do not mention any nomination process by the general electorate for the selection of the low-income representatives. Rather, the by-laws only require that "persons who are interested in serving on the board should attend the annual meeting and state their interest in being a representative of the poor from the low-income sector." Of more critical importance, however, is that, even assuming that the public residing in the service area, without limit, is given the opportunity to nominate any candidates they choose from the service area for these board seats, these "nominees" are not elected to the board by a vote of the general electorate. Thus, since less than a majority of the Employer's board is composed of public officials or individuals responsible to the general electorate, I find that the Employer is not an exempt political subdivision and that it is an employer under Section 2(2) of the Act.[10]

[10] The Employer, in support of its argument that it is a political subdivision, notes that at present one of the six members of the board who represent the private sector is in fact a public official since that person is a representative of the West Virginia Department of Health and Human Resources. Thus, the Employer argues that of the 12 board members voting on the candidates for the low-income representatives, presently over one-half are public officials, with the result being that the Employer's board provides even greater accountability to the general public than a general election because the low-income representatives are selected by a majority of board members who are public officials responsible for serving the interests of the whole electorate, not the interests of any individual voter.

I find the Employer's argument set forth above to be without merit. Again, the procedure adopted by the board for the selection of low-income representatives does not involve the election of these representatives by the general electorate within the meaning of Hawkins County. Thus, it cannot be concluded that the Employer is a political subdivision exempt from the Board's jurisdiction.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter for the reasons set forth above.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time nonprofessional Head Start employees employed by the Employer at its West Virginia facilities, including family coordinators, teachers, teaching assistants, cooks, drivers, rural transportation drivers, the program coordinator for Lewis County and maintenance employees;

Finally, the Employer avers that even if a majority of its board is not responsible to either public officials or the general electorate, it is still exempt from the Board's jurisdiction because it is effectively "an arm of the government" under the first prong of the Hawkins County standard. Although the Employer is not an official government agency, it argues that because of the complete control exercised by the federal government over it, it is effectively an administrative arm of the government because it receives over 90 percent of its funding from HHS. In this regard, the Employer argues that HHS "controls" its budget and spending by requiring it to submit a proposed budget to HHS with written justification for its requested monies and that once HHS awards the agency funding, the Employer is legally prohibited from making decisions involving significant expenditures without HHS approval.

I find the Employer's argument in this regard to be without merit. It is well established that the Board will assert jurisdiction over private contractors whose basic terms of employment arguably are controlled by political subdivisions under Section 2(2) and unambiguously exempts only government entities or wholly-owned government corporations. Had Congress intended to compel the Board to decline jurisdiction over private entities such as the Employer in this case, based on constraints that their government contracts might impose on collective bargaining, it specifically would have exempted private contractors from the Act. Management Training Corp., 320 NLRB 131 (1995), affirming 317 NLRB 1355 (1995). See Teledyne Economic Development v. NLRB, 108 F.3d 56 (4th Cir. 1997).

excluding administrative assistants, the housing coordinator, family mentor, job developer, Kids on the Block coordinator, other non-Head Start grant employees, payroll clerks, confidential employees and guards, professional employees and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The Employees will vote whether or not they wish to be represented for purposes for collective bargaining by SEIU, District 1199, The Health Care Social Service Workers Union, AFL-CIO. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **January 6, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (412) 395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting

requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the date of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing valid objections to the election based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m. on January 13, 2003. The request may **not** be filed by facsimile.

Dated: December 30, 2002.

/s/Gerald Kobell
Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

Classification Index
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